SUPREME COURT, U.S.

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No. 71-1008

# In the Supreme Court of the United States

OCTOBER TERM, 1971

JAMES STEVE HAWKINS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted on two counts of having knowingly transported falsely made or forged securities (checks) in interstate commerce, in violation of 18 U.S.C. 2314. He was sentenced to concurrent prison terms of three years. The court of appeals affirmed by order, denying petitioner's claim that a previous declaration of a mistrial on the same charge had barred further prosecution under the double jeopardy clause of the Fifth Amendment (Pet. App. 12).

The events leading to the declaration of a mistrial are undisputed. Following the empanelment of the



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jury and the opening statements of counsel, a member of the jury stood up and indicated he had made a mistake and wished to ask a question. Outside the hearing of the other jurors, the juror stated that he had misunderstood a question on voir dire and that he had in fact once been an employee of a company on which the forged checks were drawn. Petitioner's counsel told the court that his client would not waive the fact that this was not elicited on voir dire and thus refused to forego possible challenges to the juror's presence. The district judge thereupon on his own motion declared a mistrial.

Petitioner argues, as he did below, that this action precluded further prosecution under the principles announced in *United States* v. *Jorn*, 400 U.S. 470. As the court of appeals held, however, the district judge did not abuse his discretion in declaring a mistrial in these circumstances. The juror's revelation that he was once connected with the victim of the crime afforded an adequate basis for a conclusion that the interests of justice would be best served by trial before a different jury. See *Simmons* v. *United States*, 142 U.S. 148; *Oelke* v. *United States*, 389 F.2d 668, 671 (C.A. 9), certiorari denied *sub nom. Graves* v. *United States*, 390 U.S. 1029. While petitioner did not formally move for a mistrial, his counsel's indication that he would not waive any objection to the continued participation of the juror in the trial limited the trial court's

options.[1] As the plurality opinion in *Jorn* recognizes, a mistrial may be declared by the judge on his own motion when "a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." 400 U.S. at 485 (opinion of Mr. Justice Harlan).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

MARCH 1972.

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[1] Although the record is silent on the matter, we are informed by the Assistant United States Attorney who tried the case that there were no alternate jurors. While under Fed. R. Crim. P. 23 (b) the parties could have stipulated to a trial by a jury of less than 12, this option does not appear to have occurred to petitioner's counsel, the government or the district court.

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